

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

**JOHN H. BURRELL v. HOWARD CARLTON, WARDEN
and the STATE OF TENNESSEE**

**Appeal from the Circuit Court for Johnson County
No. 4679 Lynn W. Brown, Judge**

No. E2005-01950-CCA-R3-HC - Filed April 21, 2006

The petitioner, John H. Burrell, appeals the denial of his petition for writ of habeas corpus in the Johnson County Circuit Court. The state has moved this court to affirm the order via memorandum opinion pursuant to Tennessee Court of Criminal Appeals Rule 20. The petition presents no cognizable ground for habeas corpus relief. Accordingly, we sustain the state's motion and affirm the order pursuant to Rule 20.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which GARY R. WADE, P.J., and NORMA MCGEE OGLE, J., joined.

John Haws Burrell, Mountain City, Tennessee, Pro Se.

Joe C. Crumley, Jr., District Attorney General; Preston Shipp, Assistant Attorney General, for the Appellee, State of Tennessee.

MEMORANDUM OPINION

The defendant was convicted in 1993 of twelve counts of sexual battery, three counts of rape, and two counts of coercion of a witness. The trial court imposed Range I sentences of one year for each of the sexual battery convictions, nine years for each of the rape convictions, and three years for each of the convictions for coercion of a witness. The trial court imposed partial consecutive sentencing for an effective sentence of 24 years in prison. The judgment was affirmed on appeal. See State v. John Haws Burrell, No. 03C01-9404-CR-00157 (Tenn.Crim. App. Feb. 11, 1997), app. denied (Tenn. Oct. 6, 1997). The United States Supreme Court denied the petitioner's petition for writ of certiorari. See Burrell v. Tennessee, 523 U.S. 1062, 118 S. Ct. 1393 (1998). On June 22, 2005, the petitioner filed a petition for writ of habeas corpus, his seventh, in which he claimed that he was being illegally restrained based on a sentence enhanced in violation of his constitutional rights as enunciated in Blakely v. Washington, 542 U.S. 296,

124 S. Ct. 2531 (2004). On July 18, 2005, the trial court dismissed the petition, finding that it failed to state a cognizable claim for relief.

The grounds upon which habeas corpus relief may be granted are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). The writ will issue only when the petitioner has established lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery v. Avery, 222 Tenn. 50, 432 S.W.2d 656 (1968); State ex rel. Wade v. Norvell, 1 Tenn. Crim. App. 447, 443 S.W.2d 839 (1969). The purpose of the habeas corpus petition is to contest a void, not merely a voidable, judgment. State ex rel Newsome v. Henderson, 424 S.W.2d 186, 189 (1969). In this case, the petitioner does not contend that his sentence has expired, thus, he is only entitled to relief if the convicting judgments are void.

The petitioner has essentially alleged that his multiple convictions for rape and witness coercion are void because his sentence was enhanced in violation of the requirements of Blakely. In particular, the petitioner alleges that the failure to set forth in the indictments the facts supporting his enhanced sentence and to have a jury determine these facts violates the Sixth Amendment's notice and jury trial guarantees. The petitioner's claim that his sentence was imposed in violation of constitutional rights, even if true, would render the judgments voidable, rather than void. The petition, however, is not properly construed as a post-conviction petition because it is untimely having been filed several years beyond the applicable statute of limitations. In fact, the petitioner filed a post-conviction petition on March 31, 1999, which was summarily dismissed as time-barred. On appeal, this court affirmed the judgment. See John Haws Burrell v. State, No. E1999-02762-CCA-R3-PC (Tenn. Crim. App. Jan. 8, 2001), app. denied (Tenn. May 21, 2001). Moreover, separate panels of this court have concluded that the Blakely decision is not retrospectively applicable to cases on collateral review. The petitioner's Blakely-based claim of a void judgment would thus avail him no relief. See Isaac Lydell Herron v. State, No. W2004-02533-CCA-R28-PC (Tenn. Crim. App. Nov. 22, 2004) (order); James Allen Bowers, Jr. v. State, No. E2004-02289-CCA-R28-PC (Tenn. Crim. App. Dec. 6, 2004) (order), app. denied (Tenn. Mar. 7, 2005). Lastly, in State v. Gomez, 163 S.W.3d 649, 651 (Tenn. 2005), our supreme court concluded that "Tennessee's sentencing structure does not violate the Sixth Amendment." Gomez, therefore, would also preclude any relief to the petitioner.

The petitioner has failed to present any evidence that his sentence has expired or that his conviction is void. Accordingly, summary dismissal of the petition was proper and the state's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals. Consistent with the taxation of costs below, costs on appeal are taxed to the petitioner, for which execution may issue.

JAMES CURWOOD WITT, JR., JUDGE